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Appellee's Brief 1976-SC-0444

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APPELLEE'S BRIEF

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3834

SUPREME COURT OF KENTUCKY

File No. 76-444

WOLF CREEK COLLIERIES COMPANY — APPELLANT

VS.

WILLIAM HORN, JR.,
JAMES YOCUM, Custodian of the
Special Fund, and KENTUCKY
WORKMEN'S COMPENSATION BOARD — APPELLEES

Appeal from the Martin Circuit Court
Hon. W. B. Hazelrigg, Judge

FILED

JUL 9 1976

Maruna Layne Collins
CLERK
Supreme Court Of Kentucky

BRIEF FOR APPELLEE WILLIAM HORN, JR.

William S. Kendrick
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82 Main Street, P. O. Box C
Paintsville, Kentucky 41240

Attorneys for Appellee, William Horn, Jr.

This is to certify that a true copy of the within Brief for Appellee, William Horn, Jr., was this 24th day of June, 1976, mailed postage prepaid to the Hon. William G. Francis, Francis, Kazee and Francis, 130 Court Street, Prestonsburg, Kentucky 41653, Attorney for Appellant; to the Hon. James F. Kamp, Special Fund, Department of Labor, Frankfort, Kentucky 40601, Attorney for Appellee, Special Fund; to the Hon. William Huffman, Director, Workmen's Compensation Board, Department of Labor, Frankfort, Kentucky 40601; and to the Hon. W. B. Hazelrigg, Martin Circuit Court, Inez, Kentucky 41224, Trial Judge.

William S. Kendrick
ATTORNEY AT LAW

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ISSUE PRESENTED

WHETHER THE BOARD ERRED IN ITS DISMISSAL OF THE CLAIMANT'S MOTION TO REOPEN?

APPELLEE'S ANSWER: "YES."

SUPREME COURT OF KENTUCKY

File No. 76-444

WOLF CREEK COLLIERIES COMPANY — APPELLANT

VS.

WILLIAM HORN, JR., JAMES YOCUM, Custodian of the Special Fund, and KENTUCKY WORKMEN'S COMPENSATION BOARD — APPELLEES

BRIEF FOR APPELLEE, WILLIAM HORN, JR.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The Appellant, Wolf Creek Collieries Company, has appealed from the Judgment of the Martin Circuit Court which ordered that the case be remanded to the Kentucky Workmen's Compensation Board for further consideration of Appellee, William Horn's motion to reopen his claim on a change of condition under KRS 342.125. The other Appellees are James Yocum, Custodian of the Special Fund, and the Kentucky Workmen's Compensation Board.

EVIDENCE

William Horn filed a Form 11 with the Board on or about July 7, 1971 claiming that he was injured in November, 1970 during the course of his employment with the Appellant, Wolf Creek Collieries Company (Original Board Record, pp 1-2). At the hearing, on July 29, 1971, the claimant stated that he received an injury when he lifted a crib lock, threw it, and twisted his back. (Original Hearing Transcript, p 3). The claimant consulted a doctor on January 26, 1971 and returned to

work after receiving a "work slip" from Dr. Raymond Wells allowing the claimant to resume normal work activities, and he worked until the 12th of February, 1971 (Original Hearing Transcript, p 3). On June 5, 1972, the Workmen's Compensation Board of Kentucky approved a settlement of the case, awarding to the claimant benefits based on a permanent-partial disability of 61.06% (Original Board Record, p 66).

On January 16, 1973, some seven (7) months after the order approving the permanent-partial disability settlement, the claimant filed a Motion to Reopen the claim upon the basis of a change in conditions, pursuant to KRS 342.125 (Original Board Record, p 91). In support of the claimant's motion, an affidavit of Dr. Herbert Knodt was filed. Dr. Knodt stated in the affidavit that "since the settlement of the above case which took place in May, 1972, the Plaintiff's condition has progressively grown worse so that there has been a change of condition and the disability of the Plaintiff has increased as a result of the injury which he sustained in the employment of Wolf Creek Collieries Company in 1971" (Affidavit of Dr. Knodt).

The claimant testified at a hearing on May 25, 1973 that his condition had grown much worse (Transcript of Hearing, p 3). The evidence that the Plaintiff's condition had changed was later supplemented by a deposition of Dr. Herbert Knodt to the effect that Plaintiff's condition had grown much worse (Deposition of Dr. Knodt, pp 9, 11).

The Appellant employer offered no evidence to contradict Dr. Knodt's affidavit and deposition and the Plaintiff's testimony, which were all to the effect that his condition had grown worse since the settlement of May, 1973. The Board entered an Opinion and Order on June 17, 1974 denying the motion of the claimant to reopen. The claimant filed a Petition for Reconsideration and a Supplemental Petition for Reconsideration and submitted the aforemention deposition of Dr. Knodt. On August 5, 1974, the Board entered an Order which overruled the Petition and Supplemental Petition for Reconsideration (Original Board Record, p 81).

The claimant filed a Petition for Review-Appeal in the Martin Circuit Court in August, 1974 (Transcript of Record, pp 2-6). On February 3, 1976, the Martin Circuit Court entered an Order and Judgment which stated:

> "The evidence to the effect that the plaintiff's condition has grown worse since he settled his claim is uncontradicted. The only evidence in the record is that of the plaintiff and Dr. Herbert Knodt, who both gave an affidavit to this effect, and following the plaintiff testifying before a hearing officer, testified for the plaintiff by way of deposition to this effect. Both the plaintiff, and more particularly, Dr. Knodt, testified that the worsening of his condition since he settled same was a result of the injury here concerned with. Based on the condition, that is, the uncontradicted testimony of the plaintiff taken at the hearing on reopening and that of his physician taken by deposition, and the fact that the defendant submitted no evidence, this Court concludes that a remand is necessary."

Accordingly, the Martin Circuit Court remanded the cause to the Board for reconsideration. The Appellant then prosecuted this appeal.

ARGUMENT

WHETHER THE BOARD ERRED IN DISMISSING THE CLAIMANT'S MOTION TO REOPEN

It is significant to note that the Appellant employer, introduced no evidence whatsoever, whether medical or lay, to contradict the affidavit of Dr. Knodt and the testimony at the hearing by the claimant that his condition had worsened. The Court faced nearly an identical fact situation in Ratliff v. Harris Brothers Construction Company, 441 S.W. 2d 127 (1969), as to the case at bar. In Ratliff the Board summarily refused to reopen the claimant's case even though the claimant and his doctor had submitted affidavits, which went uncontroverted by the Defendant, that his condition had substantially worsened since the Board-approved settlement (Ratliff v. Harris Brothers Construction Company, 441 S.W. 2d 127 at 128). The Court of Appeals wrote in Ratliff in pertinent part as follows:

> "The question now confronting us is whether the Circuit Court erred in affirming an Order of the Workmen's Compensation Board denying appellant's motion to

reopen and review his workmen's compensation claim pursuant to KRS 342.125..."

"On February 5, 1968 Ratliff filed a motion seeking to have the Board reopen and review his workmen's compensation award. Affidavits were submitted by Ratliff and by Dr. A. T. Gordon, flatly asserting that Ratliff's physical condition and disability has substantially worsened since February 27, 1967, the date of the last ruling of the Board..."

"In this state of case the motion to reopen is supported by uncontroverted medical evidenciary material reflecting a change of condition. The Board must regard these uncontroverted allegations as true. Blue Diamond Coal Companies vs. Meade, Ky 289 S. W. 2d 503, 504. It was error for the Board to summarily deny the motion to reopen in the face of the uncontroverted showing that a material change in condition had occurred since the previous award..."

"The judgment is reversed with direction to remand the case to the Workmen's Compensation Board for further proceedings consistent with this opinion." (Ratliff v. Harris Brothers Construction Company, 441 S. W. 2d 127-129 (1969)).

In the case at bar, the claimant testified at a hearing on his Motion to Reopen that his condition had worsened (Transcript of Hearing, p 3). Dr. Knodt stated in his affidavit and in his deposition that Mr. Horn's condition has grown worse since the settlement of 1972, and that the worsening of his condition was the result of the injury he received while in the employment of the Appellant, and that such injury has now rendered him totally disabled (Deposition of Dr. Knodt, pp 8-9). The Appellant has not contradicted this evidence by affidavit or by any medical or lay proof whatsoever.

Thus, the ruling of the Circuit Court remanding the case to the Board was proper, as in the case of Ratliff v. Harris Brothers Construction Company, supra.

The present case falls directly within the premise of Ratliff v. Harris. Clearly, the Board erred in refusing to reopen the claimant's case in light of the uncontradicted and uncontroverted evidence the claimant submitted in support of his motion.

The Appellant employer argues that the testimony of the doctors who examined the claimant was all to the effect that the claimant was totally disabled at the time that he made his settlement, and the

claimant was aware that he was totally disabled, and so should not be allowed to reopen his claim. In making this argument, the Appellant indulges in a presumption that is erroneous and not supported by the evidence. The claimant himself testified at the hearing that his condition had worsened since the time he had entered into the settlement of May, 1972, (Transcript of Evidence, pp 2, 3).

> "Q9. How does your condition with regard to your back and leg compare now to the way it was when you settled your case in May of 1972?
>
> A. It's a lot worser.
>
> Q10. In what regard is it worse?
>
> A. Well, I get numbness of the left leg. The pain starts in the middle of my back, and it comes over and down my left leg. My left leg gets numb, and at times it will collapse on me. If I stand a lot or walk a lot, or if I try to stoop or bend over, the pain is worser then..."
>
> "Q15. And I believe you said it was worse now than it was in May of '72. When did you first notice any problems as far as it getting worse?
>
> A. Oh, I'd say about a month or so later, maybe, it started getting worser, you know, probably gradually, but it was worser... The pain started lasting longer. You know what I mean. For awhile it would ease up, but anymore it don't. It stays there all the time."

Thus, the claimant specifically testified as to what exact changes he had experienced in his condition, and when they began to occur. Appellant, in its brief, implies that since the claimant testified that he has not worked since filing his original claim, that the claimant must have somehow known or considered himself to be totally disabled. Again, the Appellant indulges in a presumption that is not supported by the evidence. At his original hearing on July 29, 1971, the Plaintiff never did testify that he considered himself "totally disabled", and testified that he had gone back to work on two occasions after his injury, but had to quit because his back still bothered him (Transcript of Evidence, pp 3-4). At the hearing on May 25, 1973, the claimant testified that he could possibly have done light work after his injury and at the time of his settlement in May of 1972 (Transcript of Hearing,

p 9). Further, the claimant testified that when he went back to work after his injury, he was able to do "light work":

> "Q3. Have you ever had a job doing sedentary work or light work, sitting down type of work?
>
> A. When I went back to work on a light-work slip, they gave me a light job for while, clean up, you know. There wasn't too much strenuous lifting in it or anything like that, but then they put me back to hard work, and I couldn't stand it." (Transcript of Evidence, p 11).

Thus, the claimant's testimony, indicates that he did not consider himself totally and permanently disabled, that he attempted to work after his injury, and that after his settlement, his condition has deteriorated.

Nor does the medical evidence indicate or show that the claimant was "totally and permanently disabled" at the time of the settlement of his claim. The deposition of Dr. Kearns R. Thompson, who examined the claimant at the request of the Appellant, which deposition was taken April 7, 1972, shortly before the claimant entered into the settlement, indicates that the claimant could easily have returned to work:

> "Q31. And what was your conclusion with respect to your examination and your experience, and the history and background given to you by Mr. Horn?
>
> A. This patient had subjective complaints but no objective manifestation or residual of injury and no neurological deficit..."
>
> "Q32. Doctor, in your opinion could Mr. Horn return to his regular work which he was doing at the time he told you that he received this injury?
>
> A. I felt he could, sir. I felt that this patient should and could return to gainful employment.
>
> Q33. Was there any functional impairment that would prevent him from doing that type of work?
>
> A. None that I could find, sir." (Deposition of Dr. Thompson, pp 11-12). (Emphasis Added.)

It can hardly be said that the evidence showed that the claimant was totally and permanently disabled when he made the settlement in May of 1972, when the deposition of the Appellant's own witness, Dr. Thompson, states emphatically that the claimant was not impaired and could

return to work. Even the testimony of the claimant's own treating physician indicates that the treating physician thought at the time, that the claimant was only temporarily disabled:

"Q8. Did you notice any impairment from the first time he visited til the last visit?

A. Yes.

Q9. Did it improve?

A. Yes.

Q10. Had it improved so that you stated he could try to go back to work?

A. Light work, yes. ...

"Q13. This present disability of 100%, is that temporary or permanent?

A. Based on -- I rate that as temporary disability with the prognosis I gave.

Q14. You have hopes the condition will improve?

A. Yes.

Q15. And disability will be reduced?

A. Yes.

Q.16. Did you find any evidence of atrophy?

A. No.

Q17. Is it usual in a disc case that there is evidence of atrophy in either one or the other leg?

A. Only if there is almost total disability. (Deposition of Dr. Arthur B. Richards, pp 8-9) (Emphasis added).

It is obvious, then, that Dr. Thompson and Dr. Richards did not consider the claimant to be totally and permanently disabled. Dr. Richards had every hope that his condition would improve and that his disability was only temporary.

From the record, it is clear that at the time the claimant made a settlement, there was a bona fide dispute between the parties as to the extent of claimant's disability. The Appellant should not now be permitted to claim that the claimant at the time the settlement was entered was totally disabled when, at that time, the Appellant's position was that the claimant was not disabled at all, and the proof of Appellant's own witness, Dr. Thompson, supports that conclusion.

The Appellant, in its brief, cites Wells v. Fox Ridge Mining Company, Ky., 243 S.W. 2d 676 (1951); Young v. Charles F. Trivette Coal Company, Ky., 459 S.W. 2d 776 (1970), and Young v. Harris, Ky., 467 S.W. 2d 588 (1971), in support of his position that the claimant is not entitled to have his case reopened. However, these cases are distinguishable from the case at bar because they all deal primarily with attempts of the claimants in those cases to reopen their claims on the basis of a mistake under KRS 342.125, rather than a change of condition. In Wells, for instance, the Court stated that the record showed "There has been no change in his (claimant's) physical condition. Every fact which he now produces was known to him at the time the settlement was had." (Wells v. Fox Ridge Mining Company, 243 S.W. 2d 676 (1951)) In that case, claimant had filed to reopen on the basis that he was mistaken as to the extent of his original disability. In the present case, the claimant does not contend that he was mistaken as to the extent of his original disability, but that he has in fact had a change of condition which justifies reopening his claim. As pointed out before, this is substantiated by claimant's testimony at the hearing, and by Dr. Knodt's deposition, which reads in part:

> "Q2. Doctor, what is there about this man that causes you to think there's been a progression of his condition?
>
> A. This gentleman?
>
> Q3. Yes, sir.
>
> A. The main reason for this opinion is the fact that he had already shown evidence of a disc protrusion by the myelogram whenever he had it in Ashland, Kentucky, and that since then, there's no evidence that this further disc protrusion in his lumbar spine, or to state it some other way, in the affidavit which I reviewed was first made a diagnosis of a lumbar-sacral sprain with left sacroiliac joint involvement, and this was later corrected on the basis of a myelographic finding and disc protrusion at L-4, L-5." (Deposition of Dr. Knodt, pp 11-12) (My emphasis).

In light of the uncontradicted testimony of the claimant and the uncontradicted affidavit and deposition of Dr. Knodt, it is clear that the claimant, at the time of his Motion to Reopen his claim, had under-

gone a change of condition which justified the reopening of his claim. Under the rule of Ratliff v. Harris Brothers Construction Company, 441 S.W. 2d 127 (1969), the Board is obliged by law to reopen the Appellee's case for further consideration.

CONCLUSION

The claimant has certainly shown by uncontradicted evidence that his condition has changed, which justifies the reopening of his workmen's compensation case under KRS 342.125. The evidence of the claimant, Dr. Knodt, and of the Appellant's own witness, Dr. Thompson, in his deposition given just before the settlement was made, all show that the claimant has had a change of condition since that settlement. Therefore, the Order and Judgment of the Martin Circuit Court should be sustained, and the Board should be required to reopen and reconsider the Appellee, William Horn's claim.

RESPECTFULLY SUBMITTED,

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